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No. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WALTER J. MILLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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THE MUMMA CASE IS NOT APPLICABLE TO THE PETITION AT BAR.

Counsel for the United States cite the case of *Mumma v. United States*, 352 U. S. 1003, stating that the court denied a petition for writ of certiorari in 1956, which case asked the court to overrule *Wickard v. Filburn*. This implies that the same question was raised as in the present petition before the court. The case however can clearly be distinguished from the present case before the court and the following, only too obvious, distinctions are noted:

1. The answer filed by the defendant in the *Mumma* case alleged no affirmative defenses, as in the case presently before the court: The Honorable Judge Follmer, District Judge, United States Court for the Middle District of Pennsylvania in his opinion, stated as follows:

> "The best that can be said for the answer and the affidavits is that they contain mere formal denials and general allegations without showing any facts in detail or with precision to prevent such a summary judgment".

2. The petition for writ of certiorari filed in the *Mumma* case presented eight (8) questions to the Supreme Court. None of the questions which were presented in that case are before the court in the present petition for writ of certiorari. In truth and in fact, there is no similarity whatsoever in the questions presented.

The government, in its brief in opposition, cites merely two questions as being presented in this case when there are really four before the court. We feel that there is no need to reiterate them but the petitioner would like to emphasize the following, deleted from the questions presented by the brief in opposition. The changing of the wording by the government is not the questions presented. The questions presented in question No. 3 was "Is the Agricultural Adjustment Act of 1938, as amended (7 USCA 1281 et seq., 52 Stat. 31 et seq.) applicable to a *farmer who has not been nor has ever been in regard to wheat, engaged in inter-state commerce or affecting the same, either directly or indirectly and who has never accepted any benefits either directly or indirectly under the act.*" The narrow question as to whether he has or has not marketed wheat was not the issue raised by the affirmative defenses in the answer filed by the defendant in this case. The petitioner herein, has specifically, by affirmative defenses, denied that he, in regards to wheat, was engaged

in interstate commerce or affected the same directly or indirectly and that he never accepted any benefits.

The brief in opposition of the petition states that the court's opinion in the *Wickard* case does not even mention past acceptance of benefits under the act. The Supreme Court concluded its decision in *Wickard v. Filburn* as follows:

> "That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law."

This language in itself would show that the court concluded and found from the facts in the case that the appellee in the case had received benefits under the act and in fact received direct benefits. This is not the case before the court in the petitioner's facts. Miller had received no benefits either directly or indirectly.

The brief in opposition to the petition for writ of certiorari contends that the facts in the case were not the basis for the court's decision and, in effect, the court gave what would be called "an advisory opinion" as to the overall constitutionality of the Act, based upon any set of facts. This has never been done in the history of the Supreme Court and it likewise is true in *Wickard v. Filburn*. The government attorneys would have us believe that the case of *Wickard v. Filburn* should be cited as a decision of this court resolving any set or circumstance of facts with regard to the applicability or constitutionality of 7 U. S. C. 1281 et seq. commonly known as the Agricultural Adjustment Act of 1938, as amended. This has not, cannot, and should not be so.

One of the important factors decided in *Wickard v. Filburn* as to the farmer in the case was that there was a

contribution by the farmer towards the wheat in interstate commerce, though it was trivial. In the *Miller* case, there was no contribution, trivial or otherwise by Mr. Miller of his wheat as to interstate commerce. This was raised by affirmative defense of Miller in his answer to the complaint of the government.

The Proposition That Petitioner's Failure to Exhaust Administrative Remedies Precludes Raising Constitutional Questions in the Case at Bar is Not Tenable.

The Court of Appeals refused to consider the constitutional question raised by defendant because of defendant's alleged failure to apply for and exhaust his administrative remedies. (Pet. 18-19). The court goes so far as to say that this alleged failure actually deprived the District Court of jurisdiction to determine any constitutional questions which defendant seeks to raise. Defendant contends that he has raised the constitutional question at the earliest possible time and the District Court in this case was the only forum in which such question could be properly raised.

We now make a cursory review of the specific code sections which the Court of Appeals cited as constituting the administrative remedies which defendant should have pursued on his constitutional question. (Pet. 18-19)

The court refers to 7 U. S. C. Section 1340 (12), the relevant portion of which follows:

> (12) "Notwithstanding the foregoing provisions, the farm marketing excess for any crop of wheat for any farm shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary."

The secretary's jurisdiction under this section is limited to the determination of a specific fact. The constitutional question is hardly within the scope of this section.

The court next referred defendant to 7 U. S. C. Section 1363. The pertinent part of this section is as follows:

> "Any farmer who is dissatisfied with his farm marketing quota may, within 15 days after mailing to him a notice as provided in Section 1362 of this title, have such quota reviewed by a local review committee composed of three farmers appointed by the Secretary".

It is obvious that the jurisdiction of this committee is limited to a review of the determination of the farm marketing quota. This view is supported by the case of *Smith Land Co. v. Christensen, et al.*, 148 F. 2d. 184, and the court stated:

> "The review committee did not have anything to do with the imposition of the penalty or the release of it. That was entirely beyond the duties and function of the committee."

The determination of the farm marketing quota for wheat consists of the application of a mathematical formula determined by the law (7 U. S. C. Section 1335 (c), 1340 (1)) applied to the farm acreage allotment determined by the secretary through local committees (7 U. S. C. Section 1334 (6)). The statute gives the review committee nothing more to do than to review the accuracy of this determination in accordance with the law and regulations. Is this then the point where defendant should have asserted his constitutional rights? Are we to assume that the constitutional question is to be determined by a committee of three farmers? There is nothing here to indicate that Congress intended to confer such jurisdiction upon this review committee. It goes without saying that to have done so would have been an unconstitutional delegation of judicial power and this should never be presumed.

The court then suggests that the remedy for constitutional relief might have been sought under 7 U. S. C. Section 1365. A pertinent portion of this code section is as follows:

> "If a farmer is dissatisfied with a determination of the review committee, he may, within 15 days after a notice of such determination is mailed to him by registered mail, file a bill in equity against the review committee as defendant in U. S. District Court or institute proceedings for review in any court of record of the state having general jurisdiction, sitting in the county of the district in which his farm is located, for the purpose of obtaining a review of such determination."

It is obvious that this section provides only for a review of proceedings within the jurisdiction of the review committee. It would stretch the imagination to hold that this section was intended to give the reviewing court jurisdiction over matters not properly before the lower tribunal. In other words, if the farmers are given no jurisdiction in 7 U. S. C. Section 1363 to determine constitutional questions, then the court in the particular proceedings provided in 7 U. S. C. Section 1365 is given no such jurisdiction.

A study of 7 U. S. C. Section 1366 which sets forth the duties of the reviewing court in this situation adds support to petitioner's contention. The court is clearly limited to consideration of the evidence presented to the review committee, either in its original proceedings, or in supplemental proceedings, if it is shown that "such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee". It is obvious that even this additional evidence is merely evidence germane to the limited issue before the review committee, namely the determination of the farm marketing quota. Any further evidence germane to the constitutional issue but not per-

tinent to the quota could not be presented to the court under 7 U. S. C. Section 1366. The court is expressly limited to the original record and the supplemental record of the board of review.

Furthermore, the disposition of this proceeding which the court is directed to make eliminates the possibility that Congress intended the constitutional question to be raised at this point. 7 U. S. C. Section 1366 provides as follows:

> "If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as in the court's opinion, the law requires."

Obviously, it is intended here that the court, if dissatisfied, will remand the case for further calculations regarding the farm marketing quota. The court has only two choices under this statute. It may affirm or it may remand to the committee. If, however, the court were given jurisdiction of a constitutional question in this proceeding it would have to have three choices—to affirm, to remand, or if the action of the review committee were unconstitutional, to enter final judgment for the petitioner. But the statute does not contemplate the latter possibility. If the court decided an appeal on the constitutional question, it would not make sense to remand the proceeding to the three farmers with the direction for them to find the farm marketing quota unconstitutional. Yet if we assume the court has the constitutional jurisdiction, this would have to be the procedure according to the language of 7 U. S. C. Section 1366. The closer we study Section 1366, the more obvious it becomes that the review jurisdiction granted to the court is very limited, so limited that it precludes the determination of a constitutional question.

There is nothing in these code sections cited by the Court of Appeals to indicate that all evidence regarding issues of fact pertinent to constitutional rights must either be presented to the committee of three farmers or the right is waived. Certainly we should not presume that Congress intended such an unusual expansion of judicial power. Any reference in 7 U. S. C. Section 1367 to the "legal validity" of the review committee's determination must in the light of the foregoing code sections, be construed as meaning its validity as determined by the statutes and regulations and not by the United States Constitution.

The principal question is not whether Congress could have vested jurisdiction to determine constitutional questions in a committee of farmers but whether in fact it did. We think that it did not.

Therefore, the statement by the Court of Appeals that defendant is precluded from raising his constitutional questions in the present proceedings is completely without merit.

Another reason why the petitioner should be permitted to raise the constitutional question at the time when he did so, is that some of the evidence highly material to the constitutional question, was not germane to the issues before the administrative bodies.

This evidence concerns the disposition of the 1954 wheat crop. According to the evidence in the record, this wheat was stored. It was not placed on the market. It was not fed to animals which were placed on the market. It was in storage on the defendant's farm from the time it was harvested until the time the complaint was filed on September 15, 1955, and the issues in this proceeding were joined.

The facts regarding disposition of the wheat, which defendant will urge in support of his constitutional argument, were not germane to the issues at any of the administrative

hearings available to defendant prior to the hearing on the complaint. The reviews of the determination of marketing quota or marketing excess provided by the statute have nothing to do with the current location or disposition of the harvested wheat at the time of such review. The factual scope of this jurisdiction is limited just as the jurisdiction of legal questions.

It was only at the time the defendant was charged with a penalty for violating the law that the location and disposition of the wheat from harvest to the time the complaint was filed could be placed in evidence to show that at no time prior to the complaint had the defendant done any act which would make him subject to the law. The application of the law to the facts as they existed at the time the complaint was filed is the question defendant is raising in these proceedings.

In short, defendant contends that where his defense is that he has done no act which would make him subject to the law, he is entitled to place in issue all evidence regarding his activities prior to the date the law's sanction was invoked.

Both the United States Constitution and Rule 81 of the Federal Rules of Civil Procedure Bar the Granting of a Summary Judgment Where Forfeiture of Private Property For Violation of a Criminal or Quasi-Criminal Statute is Involved.

It is the contention of the attorneys for the Federal Government (and the summary action of the District Court and the upholding of said action by the Court of Appeals sustains said contention) that Congress, *acting under the Commerce Clause* in the United States Constitution can:

1. Delegate to the Secretary of Agriculture the power to appropriate usufruct of a farmer's land by predetermin-

ing what portion of said land he may use and by then summarily confiscating the harvest from land used in excess of said determination.

2. Deprive a citizen of his right to trial by jury upon an attempted confiscation of his private property as a sanction for violating a federal edict, by merely saying "this is a civil sanction."

3. By administrative procedure prescribed for the enforcement of an Act, completely deprive a citizen of his right to raise objection to the constitutionality of said Act as applied to him when the first opportunity for raising said objection before a competent judicial body has been presented.

In arguing against allowance of appellant's petition for a writ of certiorari, attorneys for the government assert that the petitioner's affirmative defense (that he had not marketed any part of his wheat in interstate commerce) raises an immaterial issue and lays no basis for trial by jury. It is respectfully submitted, however, that every allegation which attacks the constitutionality of the Act sought here to be enforced against petitioner and which affirmatively denies commission of acts which would make the Act and the regulatory power of Congress applicable to him, raises a material issue. Although attorneys for the government see no distinction between the *Wickard* case and the case at bar, the appeal of a citizen to the judicial branch of his government for protection of his personal and property rights from confiscation certainly requires that the judiciary give pause and examine whether a criminal sanction is sought to be imposed, and whether the situation in such a case is the same as presented in the *Wickard* case. The rationale of the Court of Appeals on this point, as evidenced by its opinion, clearly demonstrates a complete failure on the part of the lower court to examine

into this question. The Court of Appeals in its opinion states "the Agriculture Act provides not for 'forfeiture' but for a money judgment for penalties established for non-compliance." What, pray tell, is the difference between forfeiting one's property for failure to obey an edict and paying a money fine (as a substitute for forfeiture) for failing to obey said edict? The court further states "it is not a crime to produce in excess of the marketing quota * * * in fact, a producer may grow whatever quantity of wheat he wishes, *provided he pay the civil penalty*". What nature of right is this, that its exercise bears the onus of a penalty? The court might as well say a man is free to kill any one he chooses, provided he pays the penalty. The court further states that "the purpose of requiring the penalties was not to raise revenue for the government but to *discourage the planting and marketing of more than the quotas established*." Does not depriving a citizen of the use of his land clearly entail a taking of private property without compensation?

Counsel for petitioner are convinced that the protection afforded every citizen by the United States Constitution clearly preclude the summary action taken in this case. Irrespective, however, of said constitutional safeguards it is difficult for petitioner's counsel to understand how the court can ignore the express provisions of Rule 81 of the Federal Rules of Civil Procedure, particularly in view of this court's ruling in the case of *Boyd v. The United States*, 116 U. S., 616, 6 S. C., 524, 29 L. Ed., 746, followed in the case of *United States v. Solomon*, 3 F. R. D., 411. The court, in the *Solomon* case stated that

> "It is quite clear that the penalties * * * are meant to be and operate as a punishment for violation of the law and though such penalties are to be recovered in the civil suits, such suit though civil in form, is not 'of a civil nature' to which the federal rules of civil procedure are limited, but of a criminal or quasi-

> criminal nature. Wherefore, under the terms of said Rule 1, a suit for penalty such as that before the court is not within the scope of the rule."

The pronouncement of the Supreme Court as explained in the *Solomon* case should settle the procedural question raised in this case but both the District Court and the Court of Appeals have sought to avoid it by stating that the case does not involve a forfeiture of property. From the vantage point of petitioner's counsel, however, it is patent on its face that *forfeiture is involved* and that not only is Rule 81 here applicable, but that even without said rule, neither the federal courts, Congress nor the executive department can *confiscate* a citizen's property without affording him his day in court to question the basis upon which such confiscation is founded. This basic concept of "due process of law" appears so exasperatingly clear that the necessity of having to carry the question all the way to the Supreme Court of the land for final resolution can hardly be described as anything other than utter frustration.

Attorneys for the government argue that petitioner, having failed to pursue his administrative remedies respecting the determination of his farm marketing quota, cannot, in this action, attack the validity of the determination. The lower courts agreed with such argument. The position of the petitioner is that he is not now, never has been before, and cannot be required to pursue administrative remedies affecting legislation which is, itself, unconstitutional and that his failure to follow said administrative remedies cannot deprive him of the right to raise the question of said unconstitutionality before a competent judicial tribunal. The Court of Appeals stated that

> "the District Court and this court are deprived of jurisdiction by defendant's failure to seek review * * * Moreover, *defendant's inaction precludes him for rais-*

ing his constitutional question for these questions clearly bear upon the 'legal validity' of the determinations."

Counsel for petitioner respectfully submits that if the right of a citizen to question the constitutionality of legislation can be lost before he ever has the opportunity to exercise it before the judicial branch of his government, it will only, of necessity, be because the judiciary joins with the legislative and the executive branches in declaring that said right does not exist in the first instance. Surely, such is not the case! Despite the pronouncement of the Court of Appeals in the last paragraph of its opinion, defendant's remedy *as to constitutional questions* is, of necessity, to the judicial rather than the legislative.

In their argument government attorneys quote from the *Wickard* case the language that

> "the fact that the production of a particular farmer 'may be trivial by itself is not enough to remove him from the scope of federal regulation where, *as here, his contributions*, taken together with that of many others similarly situated, is far from trivial.'".

Petitioner has consistently argued that his situation is different than that of Mr. Filburn and that the court, in deciding said case, considered the particular situation of Mr. Filburn. Such conclusion is inescapable and no amount of generalization by government attorneys can deny said fact. The situation in the *Wickard* case is just not applicable to the case at bar!

SUMMARY.

In summary, petition states that:

1. The *Mumma* case is not applicable to the petition at bar;

2. The proposition that petitioner's failure to exhaust administrative remedies precludes raising constitutional questions in the case at bar is not tenable, and

3. Both the United States Constitution and Rule 81 of the Federal Rules of Civil Procedure bar the granting of a summary judgment where forfeiture of private property for violation of a criminal or quasi-criminal statute is involved.

Counsel for petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. ALBRIGHT,
Attorney for Petitioner.